

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DELAUREN OMAR GORDON,

Defendant-Appellant.

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UNPUBLISHED

July 14, 2005

No. 255080

Mecosta Circuit Court

LC No. 03-005117-FC

Before: Murphy, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree felony murder, MCL 750.316(1)(b), conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a second habitual offender, MCL 769.10, to concurrent life sentences for his felony murder and conspiracy convictions, a concurrent forty-seven to ninety months' imprisonment for his felon in possession conviction, and a consecutive two years' imprisonment for his felony-firearm conviction. We affirm.

The case stems from the shooting death of Jeremiah Monroe in his home in Big Rapids, Michigan. The evidence adduced below showed that several individuals were involved. The evidence showed that on the night of March 10 and 11, 2003, defendant, Marvin Redmond, Eli Evans, and Shannon Keys conspired to travel to Big Rapids and rob the victim. That attempt failed. The next night, defendant and Redmond returned to Big Rapids without Evans. Keys spent part of the evening with the victim. After dropping the victim off at his home, Keys called defendant and Redmond, who proceeded to the victim's home. The victim was shot during the robbery attempt and died of gunshot wounds to the neck and back.

Defendant argues on appeal that counsel was ineffective for failing to request a cautionary instruction regarding alleged accomplice testimony by Evans and for failing to object to a cautionary instruction that misinformed the jury as to the length of the prison term facing another witness, the victim's housemate, had this witness not reached an immunity deal with the prosecution. We see no merit in either claim. Defendant has not fully preserved this issue because he did not move for a new trial or seek an evidentiary hearing. Therefore, our review is based solely on the existing record. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

The determination as to whether counsel was ineffective is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The factual findings are reviewed for clear error and the matters of law are reviewed de novo. *Id.* Defendant bears the burden of overcoming the presumption that counsel was effective and must meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, defendant must show that his attorney's performance fell below an objective standard of reasonableness under the circumstances and according to professional norms. *Id.* at 687-688; *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). To establish this first prong of the test, a defendant must overcome the presumption that trial counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). Second, the defendant must show that counsel's performance so prejudiced the defendant that he was deprived of a fair trial. *Strickland*, *supra* at 687-688; *Pickens*, *supra* at 309. To establish prejudice, he must show a reasonable probability that the outcome would have been different but for counsel's errors. *People v Toma*, 462 Mich 281, 302-303; 613 NW3d 694 (2000).

Defendant's first claim of error concerns the testimony of Evans. Evans did not testify at trial, but did provide testimony pursuant to an investigative subpoena. A transcript of that testimony was admitted into evidence, and copies were provided for the jurors to read. We conclude that defense counsel was not ineffective for failing to request an accomplice instruction as to Evans. An accomplice is a "person who knowingly and willingly helps or cooperates with someone else in committing a crime . . . ." CJI2d 5.5. While Evans was arguably an accomplice with respect to the conspiracy charge as it relates to the events of the first trip to Big Rapids, it is not clear that Evans was an accomplice in the events surrounding the second trip.

Further, in his closing statement, the prosecutor conceded that "the first three quarters of" Evans' testimony was perjurious. The prosecutor asserted that even though Evans "started fessing up a little bit" after a break was taken during the taking of the testimony, "the whole transcript is suspect." Thus, the prosecutor conceded that Evans' testimony in its entirety was unreliable and should, in essence, be viewed "cautiously." See CJI2d 5.6(4).

Following and expanding on the prosecutor's argument, defense counsel argued as follows:

Let's assume that the second part [of Evans' testimony] is true, because that's when he stopped committing perjury according to the prosecutor. Well, in that part, there was never any mention about roommates, nothing about dogs, nothing about guns. Nobody had a gun, never saw a gun. . . . So, if the prosecutor wants you to accept the second part as true,<sup>[1]</sup> then you got to accept no gun was seen.

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<sup>1</sup> In his rebuttal closing, the prosecutor clarified that he "never said the last part of the transcript was true. I said the whole transcript was suspect because he committed perjury for three-quarters of it."

Defense counsel could have reasonably believed that his strategy of trying to get the jury to discount part of Evans' testimony but credit the part that was favorable to defendant (particularly with respect to the absence of a gun) would be undermined if he sought an instruction informing the jury that it should look on Evans' entire testimony with suspicion. See *People v Gonzalez*, 468 Mich 636, 644-645; 664 NW2d 159 (2003). The court did instruct the jury that if it thought a "witness lied about some things but told the truth about others, [the jury] . . . may accept the part [it] . . . think[s] is true and ignore the rest."

Further, defendant is not able to establish the requisite prejudice. Substantial evidence of defendant's guilt was adduced beyond the testimony of Evans. See *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005). Redmond's testimony was particularly harmful to defendant, and the court did give the accomplice jury instruction with regard to Redmond's testimony. Finally, as noted, the prosecutor acknowledged Evans' credibility problems, and the jury was instructed to consider whether a witness has "any bias, prejudice, or personal interest in how the case is decided" when assessing credibility. See *Young, supra*, 472 Mich 144. Under these circumstances, defendant is unable to establish that there is a reasonable probability that the outcome of the trial would have been different had the instruction been given on counsel's request.

We also conclude that counsel was not ineffective for failing to object to the court's instruction related to the victim's housemate. Here, the trial court instructed the jury that the housemate was testifying in exchange for immunity from prosecution for a drug crime unrelated to the murder. However, the court erroneously indicated that the housemate would have faced a possible penalty of four years' imprisonment instead of twenty years' imprisonment. The housemate's testimony did not incriminate defendant in the uncharged drug crime and only corroborated a minor portion of Redmond's testimony. Given the weight of the evidence incriminating defendant in the crimes charged, we do not believe this error was outcome determinative. Therefore, we conclude that counsel's failure to seek clarification did not establish ineffective assistance.

Affirmed.

/s/ William B. Murphy  
/s/ David H. Sawyer  
/s/ Pat M. Donofrio